United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7295

To be argued by
GILBERT T. DUNN

United States Court of Appeals
FOR THE SECOND CIRCUIT

CARL A. BEAZER, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

against

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants-Appellants-Cross-Appellees.

BRIEF FOR NEW YORK CITY TRANSIT AUTHORITY, *ET AL.*, DEFENDANTS-APPELLANTS

ALPHONSE E. D'AMBROSE
Attorney for New York City Transit Authority and related transit defendants
370 Jay Street
Brooklyn, N. Y. 11201
212—330-4327

E. W. SUMMERS
G. T. DUNN
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

CASE TITLE: CARL A. BEAZER, ETC. V. NEW-YORK-CITY-TRANSIT AUTHORITY, ETC.,

DOCKET NO. ▶ 76-7295

MR NUMBER ▶ T-6188

TYPE OF CASE: ☐ U.S. Civil ☐ Bankruptcy ☐ Criminal ☐ Original proc. ☒ Private Civil ☐ Prisoner ☐ Administrative

DISTRICT COURT: ☐ Conn. ☐ EDNY ☐ WDNY ☐ NDNY ☒ SDNY ☐ VT ☐ Other (specify)

▶Forms	Date Filed
A	
B	
C	6-24-76, 2-25-77
D	6-24-76, 2-25-77
CJA20	
CJA23	
Other (specify)	

DATE(S) PREARGUMENT CONFERENCE(S) HELD:

DOCKET FEE
DATE: 6-24-76
ACCOUNT OF APPELLANT:
RECEIVED: $50.00
DISBURSED:
NO FEE REQUIRED: ☐ FP ☐ 24a ☐ SC

DISTRICT COURT DATA:
DISTRICT DOCKET NO.: 72 C 5307
DATE ACTION FILED IN DIST. COURT: 12-15-72
DATE OF DISTRICT COURT JUDGMENT: 5-6-76 1-28-77
DATE N.A. FILED: 6-15-76, 2-16-77, 2-10-77,
DATE DOCKETED: 6-24-76

☒ CROSS APPEAL OR ☐ CONSOLIDATED WITH DOCKET NOS:
▶ & in 77-7092
▶ & in
▶

RECORD FILED (ORIGINAL DIST. COURT PAPERS): 1-14-77
(TRANSCRIPT(S)): 1-14-77, 5-18-77

SCHEDULING ORDERS

	SO 1 DATE ISSUED	Adj SO 2 DATE ISSUED	Adj SO 3 DATE ISSUED	Adj SO 4 DATE ISSUED	Adj SO 5 DATE ISSUED
	6-25-76	12-29-76	2-1-77	2-28-77	3-9-77
Record	7-26-76	1-14-77			
Transcript					
BRIEFS:					
Appellant	8-27-76	1-31-77	2-28-77	3-10-77	
No.				appendix 3-11-77	
Appellee	9-27-76	2-28-77	3-28-77	4-4-77	
No.					
Argument (Week of)	10-12-76	3-14-77	4-4-77	4-18-77 (SEE INSIDE FOR #4	

☐ ADJ. SO, 6 ETC. OVER ☐ APPELLEE'S APPENDIX

FILING OF BRIEF, APPENDIX, ETC.

PAPER FILED	PARTY	DATE
B	T	3-10-77
A (six vol.)	T	3-11-77
B	E	4-4-77
B(Amicus USA)		4-29-77

MOTIONS TO EXTEND TIME

	Date Filed	Order Entered
1	1-31-77	2-1-77
2		
3		
4		
5		
6		
7		
8		
9		
10		

Proceedings Held in Abeyance ☐ Reactivated ☐
Issuance of Mandate Stayed ☐ Stay Vacated ☐

CALENDAR

Date Time Request Sent: 12-29-76
Date Disqualification Sent: 3-16-77
Date Certain Notices Sent (No. sent) 1 2 3 4 5 6
Receipt of Day Certain Notices 1 2 3 4 5 6 ☑
Date Set for Argument: 5-5-77 Cus.Ct. AM
Committed ☐
Not Committed ☐
ROR ☐
Bail ☐

TERMINATION

Date Heard/~~Submitted~~: 5-5-77
Tape No.: US&C#5, A&B
Date Judgment Filed/ Order of Disposition: 7-13-76, 8-22-77
Date Mandate Issued: 7-15-76, 7-13-77
Date Bill of Costs Filed: 7-7-77
Date Statement of Costs Filed: 7-13-77
Petition for Rehearing Filed Date: Granted ☐ Denied ☐ Date
☐ Additional Petitions for Rehearing-See Docket Entries
Petition for Certiorari Filed Date: Granted ☐ Denied ☐ Date
☐ Additional Petitions for Certiorari-See Docket Entries

METHOD OF DISPOSITION

☒ WRITTEN OPINION (BY JUDGE)
☐ WRITTEN OPINION (PER CURIAM)
☐ DECISION FROM THE BENCH
☐ SUMMARY ORDER
☐ COURT ORDER W/O OPINION
☐ DEFAULT DISMISSAL (CAMP, CAEP, OTHER)
☒ CONSENT DISMISSAL (RULE 33, CRIMINAL, OTHER)
☐ 0.18(7) DISMISSAL
☐ OTHER (SPECIFY)

Record Returned: 7-18-77
Receipt of Return of Records:
Date Reopened: 12-15-76

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MISCELLANEOUS

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BRIEF FOR NEW YORK CITY TRANSIT AUTHORITY, *ET AL.*, DEFENDANTS-APPELLANTS

Statement

Plaintiffs brought this class action initially under the 14th Amendment and 42 U.S.C. §§ 1981 and 1983 seeking to invalidate on due process and equal protection grounds a policy of the defendant New York City Transit Authority and its subsidiary, Manhattan and Bronx Surface Transit Operating Authority (hereinafter "Authority") which denied employment to persons presently or in the past maintained on methadone. A cause of action for racial discrimination under Title VII of the Civil Rights Act of 1964 was added later by amendment to the complaint.

After a non-jury trial the District Court (GRIESA, J.) ruled that a blanket exclusion from employment of present or past methadone patients violated the due process and

equal protection clauses of the 14th Amendment because the policy was based on criteria having no relation to the job being performed. Individual consideration was required, said the Court. (*Beazer, et al.* v. *New York City Transit Authority, et al.*, 399 F. Supp. 1032)

Although the trial court found it unnecessary at first to reach the issue of racial discrimination, it reconsidered the matter on plaintiffs' application for Title VII relief, including an award of attorneys' fees. Finding that the challenged policy had a racially disparate impact and was without business necessity, it held there was a Title VII violation which entitled plaintiffs to attorneys' fees under the statute. (*Beazer, et al.* v. *New York City Transit Authority, et al.*, 414 F. Supp. 277)

On May 20, 1976 a permanent injunction and judgment was entered enjoining the Authority from denying employment to or dismissing from employment any person solely because of present or past participation in a methadone maintenance treatment program.

The judgment further directed that the employability of the four named plaintiffs be reconsidered according to "appropriate personnel procedures to determine the suitability of the individual for the particular job," including the consideration of "all relevant factors about the person's drug history, and the quality and reliability of any methadone maintenance treatment program having treated the person, in determining the person's suitability for the job."

The judgment also provided that the Authority could adopt rules and regulations regarding the employability of methadone maintained persons, such as satisfactory performance in a methadone maintenance treatment program for a specified time, such as a year, and restrictions against the employment of persons in "sensitive categories," such as subway motorman, subway conductor, subway tower-

man, bus driver and positions dealing with high voltage equipment.

Pursuant to the direction of the Court, the Authority re-examined the four named plaintiffs and submitted a written statement of its conclusions as well as a list of persons affected by the Authority's policy since December 15, 1972 (Dx XXX and Dx AAAA).

No need having been shown for relief against the defendants New York City Civil Service Commission and related City defendants, the complaint as to them was dismissed.

Following further hearings, an amended permanent injunction and judgment was entered on January 28, 1977. It directed the hiring of the named plaintiff Francisco Diaz as a maintainer's helper, group D (sheet metal), or in an equivalent position, "as soon as an appropriate position becomes available," with back pay and seniority rights from January 1, 1973, the amount of back pay to be offset by earnings from other employment and unemployment benefits. Similarly the Court directed the hiring of the named plaintiff Malcolm K. Frasier as a bus cleaner. The named plaintiffs Carl A. Beazer and Jose R. Reyes who were dismissed from employment on charges of violating the Authority's drug rule, 11(b), which prohibits employees from using or having in their possession narcotics, tranquilizers, amphetamines or, barbiturates without the written permission of the Authority's medical director, were denied relief, as was Nathaniel Wright, a class member, also dismissed from employment for a violation of the rule.

The amended judgment additionally set up procedures for notifying class members and awarded the plaintiffs attorneys' fees in the amount of $360,710 plus disbursements of $14,290 for a total of $375,000.

Questions Presented

1. Is the Authority constitutionally required under the due process and equal protection clauses of the 14th Amendment to hire, or retain in its employment, persons who are or in the past had been maintained on methadone?

2. Is Title VII of the Civil Rights Act of 1964, as amended, violated by the Authority's refusal to hire such persons or retain them in its employ?

Transit Authority

The Transit Authority was created by the State of New York as a public benefit corporation to operate and maintain for the convenience and safety of the public all subway and bus transportation facilities owned by the City of New York. N.Y. Public Authorities Law, §§ 1200 et seq. In carrying out that mission, the Authority employs about 27,000 persons, including hourly paid and supervisory forces, in the operation and maintenance of the subway system, and about 14,000 persons are employed in bus operations. An additional 3,500 are employed in clerical, administrative and professional titles and about 3,000 are transit police officers. Approximately 2 billion commuters are transported annually and about 6 million each business day. (Transcript, Dec. 12, 1974, pp. 25-30; Dx GG1 and Dx GG2). The organization of the system, its ramifications and various components are depicted in defendants' Exhibits GG1 through GG12 and were testimonially described at pp. 24 to 78 of the Dec. 12, 1974 transcript by the Authority's Executive Officer for Labor Relations and Personnel.

Plaintiffs and Their Class

Plaintiffs and the class they represent are persons with a history of narcotic addiction for various periods of time, specifically addiction to heroin. Each has had his addiction maintained by substituting methadone for heroin as a participant in a methadone maintenance treatment program. Methadone is a synthetic narcotic with actions quantitatively similar to those of morphine and whose route of administration is oral rather than by injection. Interestingly, heroin had at one period of time been used to "cure" morphine addition and alcoholism, and was considered a wonder drug in its day (Transcript, October 22, 1974, p. 64).

Dr. Robert L. DuPont, Jr., director of the Special Action Office for Drug Abuse Prevention in the Executive Office of the President observed at the trial "[t]here is a brain biology that is induced by the use of heroin and it then is persistent . . ." (Tr. p. 69).

The U. S. Supreme Court in 1974 stated "there is no generally accepted medical view as to the efficacy of presently known methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts remains shrouded in uncertainty." The Court further observed, "[a]s testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts." *Marshall* v. *United States,* 414 U.S. 417, 425-426 (1974).

With respect to methadone rehabilitation programs, Dr. DuPont testified that there were "good" and "bad" programs (Tr. p. 116). He observed that "[t]he treatment agencies obviously are interested in placing people in employment, so that the employer has to make his own independent judgment . . ." (Tr. pp. 38-39). Methadone maintenance treatment programs, however, are severely restricted as to the information they may lawfully furnish

an employer or prospective employer even with the consent and at the request of the participant (21 CFR 1400 et seq., Dx III) and the regulations in effect require that the employer be given only conclusory opinions by the programs as to the employability of the individual.

POINT I

It is neither a denial of equal protection or due process or a violation of 42 U.S.C. 1983 for the Authority to exclude from employment persons who are or have been maintained on methadone.

A

The Authority's policy barring the employment of persons maintained on methadone has its roots in an obvious and manifest need for the utmost precautions to insure the safety and reliability of the transit system. Whatever priorities may exist elsewhere, safety must come first in the management, operation and maintenance of the system. Testifying before trial, William J. Ronan, former Chairman and Chief Executive Officer of the Authority, said in connection with the Authority's drug policy:

> "The policy has been maintained because there was never any real move to question it, and, actually, it is part of a total policy to try to continually minimize the chance of anything going askew that will cause an accident, which would imperil the riding public. The transit business is constantly concerned with reducing the chances of accidents, and when you carry seven times the population of the United States of America in one year, and I think that is the figure, it is a very awesome responsibility, and safety is a matter of continually reducing risks and, therefore, one of our concerns always is to reduce the area of risk. One attempts to reduce this in terms of me-

chanical and electrical, in terms of personnel policies, procedures, rules and the like, and the fact that the New York City subway system is the safest rail system in the world of any comparable size, I think is a testament to the fact that the mechanical, electrical and personnel measures that have been taken are basically the factor. I for one would not like to see a loosening of these regulations which would open the door to the possibility of fatal accidents or accidents involving injury occurring. It is a very serious proposition." (Px 61 at pp. 20, 22-23)

His successor, David Yunich, also testifying before trial said that he agreed with the policy since the Authority's "deep involvement . . . with the safety of our passengers . . . made sense." Drawing on his experience as a former Vice-Chairman of R. H. Macy & Co., he also testified that there was a high incidence of theft in retail stores, as much as 6½ percent of sales, that was traceable in large measure to persons with histories of past or present drug usage. Such a high correlation of apprehensions to drug users heightened his concern for the safety and protection of the transit system. (Px 66 at pp. 3, 8, 10, 16)

Also testifying in this connection was W. B. McLaren, Executive Officer for Labor Relations and Personnel for the Authority. He, too, bore responsibility for the safety and efficient operation of the system, particularly in the recruitment of personnel and personnel administration. Giving substance to his concern was the fact, among others, that the frequency of lost time employee accidents on the transit system was second in the United States only to the coal industry. Considering the nature of the Authority's operations with attendant high risks both for employees and passengers if safety considerations were slighted, he too cautioned against taking chances with the unknown.

McLaren's views relating to the employability of methadone patients were not based on preconceived notions. He described how in conjunction with a series of accidents on the transit system in 1969 combined with the public awareness of a rising traffic in illicit drugs and their increased use, the Authority undertook a review of its employment standards, including drug screening for certain classes of employees and for all applicants for employment. As a result of such screening, over 600 persons, either employees or applicants for employment were identified as drug users between January 1, 1971 to the date of his testimony, October 1974. Having found that a serious condition existed, seminars were conducted at the offices of the Authority concerning the problem. Authority personnel were sent to various conferences conducted by commercial and industrial organizations, Cornell University, etc., to become informed on the problems of drug use. Clinics, including methadone clinics, were visited and discussions were held with their medical and other personnel. Doctors with recognized expertise in the field such as Doctors Vincent Dole, William Baird and Harold Trigg were consulted. The Authority's own Medical Director, Dr. Louis Lanzetta, who had practiced privately for many years in East Harlem and had wide experience with illicit drug use, was much concerned about the matter as were the responsible officers and operating officials of the Authority. Finding generally that the question of hiring drug users, including methadone maintained persons, was in "complete confusion," the Authority decided to make no change in its long standing rules which prohibited the use of drugs by employees and barred employment to persons using drugs. It was considered neither necessary nor desirable to make exceptions for former heroin addicts maintained on methadone (Tr., Oct. 25, 1974, pp. 496-512, 525).

Summing up the Authority's views and also reflecting his own, McLaren summarized the reasons for the Authority's policy of excluding methadone patients from employ-

ment as follows:

"Through evaluations of our own organization, its needs, its concerns for public services and safety, the welfare of our employees in this picture, the organization, the structure, the deployment of people, the supervision, the control factor, P.M., afternoon problems, people coming on the job that come on in the afternoon, the problem of working with clinics, the questionability of the clinics in New York or anywhere else, the information we have received from what we call reliable sources on the recidivism, and how well the clinics have treated people.

"The lack of any certification program, the lack of professionalism, the questions raised by the City Council, and politicians in the city, the federal government itself, and the questionable practices, the shutting down of clinics, the leaking of methadone through the clinics to the streets, the increase in deaths, the dependency on alcoholism, the use of other drugs—now take again the evaluation of our own job needs, and what we can do as an operation, what we can do as a management, how well we can control.

"The fact that we are not dealing with one person, but we have records to show and to prove that we have either rejected or terminated more than 600 employees—600 persons we are dealing with a very large problem, that in dealing with the people that represent methadone people, we are not talking about a reasonable group, they are not talking to us about the hypothetical case that you're showing, that people with only 30 days from outside the clinic are a part of this lawsuit, that we feel that we are in something that's over our head, that we cannot handle, and that we know when we have these terrible incidents in the city, where we have loss of passenger services, where we have had accidents, where we have had tunnel fires and things

like this, that we stand alone, there is no one supporting us, that it is our responsibility. No one reels to our colors. It is us alone.

"We know that our employees are maligned, we know that they suffer, they are discharged, they are terminated for these accidents, and we don't intend, if we can help it, to risk, have any further risk, in this operation than we have now.

"Now, we have compassion, we have shown that in our policies, right down the line, our policies on the employment of minorities is without peer in the United States, especially in the city, our hiring and the promotion of minority groups into the upper echelon—" (Tr. Oct. 25, 1974, pp. 552-553).

Influencing McLaren's views, and as he so testified, was a report made to the Council of the City of New York at a stated meeting on December 20, 1973, by Carter Burden, Chairman of a Special Committee on Methadone. Although the report was not received into evidence as proof of the facts stated therein, it was admitted to prove that such a document existed and that it was used and relied upon by McLaren (Exhibit Dx U; Tr., Jan. 28, 1975, pp. 741-747). The report was severely critical of the quality of treatment at methadone maintenance centers, and pointed to the lack of accountability of the programs and the lack of objective criteria for reimbursement purposes and of the inadequacy of the existing regulatory system. The Authority would be less than prudent not to take heed of such official strictures, considering the nature of its business and its obligation to the public.

B

If there is one word that has been applied to methadone maintenance as a modality for treating heroin addiction it is the word "controversial." Even the trial court on more than one occasion said that the issue involved was "contro-

versial" (E.g., Tr. Jan. 11, 1977, p. 44; Tr. Jan. 21, 1977, p. 51).

Dr. Vincent Dole, professor and senior physician at Rockefeller Institute, who was the progenitor of methadone maintenance as a treatment for herein addiction, testified generally in favor of the effectiveness of that form of treatment (Tr. Jan. 7, 1975, pp. 4, 21). However, since then he has become considerably disenchanted as evidenced by a recent article he authored in the May 10, 1976 issue of the Journal of the American Medical Association (Vol. 235, No. 19). "[T]he projections of ten years ago were overly optimistic," he says, and there has been "nearly universal reaction against the concept of substituting one (addictive) drug for another." A recent sample study of 204 persons, he states, who left methadone maintenance treatment two years earlier showed that 138 had relapsed to the use of opiates, 32 were serious alcoholics, 16 were addicted to sedatives or cocaine, 53 had been arrested, 19 had died, and only 22 of the 204 could be classified by even a lenient standard as being in a satisfactory status. Dr. Dole's views are reflected in other evaluations appearing in other published literature, such as the Journal of Drug Issues (Vol. 4, No. 4, Fall 1974).

An employer, such as the Authority, may not, consistent with its duties and responsibilities to the public, ignore such warnings and contraindications. The District Court itself opined that the Authority could refuse employment to present or past methadone maintained persons for such "sensitive" jobs as motorman, conductor, towerman, bus driver, and positions dealing with high voltage equipment. If, "substantial numbers of methadone patients are capable of successful employment," as the court said, what influenced it to exclude maintained persons from employment in "sensitive" categories. It could only be some hesitancy, not articulated, concerning the reliability of methadone maintained employees. If the court could be

hesitant, may not the Authority which alone has the responsibility for the safe operation and maintenance of the transit system be far more diffident and hesitant about introducing into the transit system unknown and unpredictable factors affecting safety and performance? At the trial, Dr. Dole was of the view that a heroin addict for two years who had been on a methadone program for two months could be hired as a motorman, but he would not recommend it, for public relations reasons (Tr. Jan. 7, 1975, pp. 98-100).

The plaintiffs' first witness, Dr. Robert L. Dupont, Jr., Director of the National Institute for Drug Abuse in the Department of Housing, Education and Welfare, testified that an employer must take "a leap of faith" when first hiring a methadone patient and thereafter should remain "vigilant" (Tr. Oct. 22, 1974, pp. 41, 107).

Another witness for the plaintiffs, Dr. Paul Cushman, Jr., Director of St. Luke's Hospital's Methadone Maintenance Clinic, agreed with the court that there are "just imponderables that you really can't measure that might be going on in somebody who is taking methadone that makes him different from a person who has never had a heroin history and did not need methadone." A bit later, however, he went on to say that the methadone maintained person and the non-drug-user were "indistinguishable" (Tr. Oct. 25, 1974, pp. 388, 391). The same Dr. Cushman was the author of an article appearing in the Wall Street Journal of January 28, 1977 in which he pointed to the public bewilderment with methadone maintenance and said "no wonder the public is confused, disillusioned and skeptical and has increasingly viewed the addiction program as controversial and of diminished importance."

Dr. Mitchell S. Rosenthal, President and Chief Executive Offcer of Phoenix House Foundation Inc., a therapeutic community center operating a residential drug-free program for the rehabilitation of addicts and drug

abusers, testified that the common denominator of such persons was that they were "psychologically disturbed" and in need of rehabilitation and mental health services which in his opinion were not being given by the methadone maintenance clinics. Rather, he considered such clinics as "mere stations" for dispensing methadone. "[I]t would be very difficult," he said, "to determine what percentage [of the city methadone] patients would be good, solid employment risks in any area," because of the insufficient length of treatment, the high incidence of cheating in the use of other drugs, which he said was in the magnitude of 70 percent (Tr. Jan. 10, 1975, pp. 411, 417-418, 424-425, 430).

Confirming Dr. Rosenthal, Dr. Judianne Densen-Gerber, Founder and Executive Director of Odyssey House, also a therapeutic community, testified that the major drug of abuse across the United States was not heroin but methadone, and she would have reservations about employing persons using the latter unless there was a very close working relationship established between the employer and the treating clinic with extremely tight controls of the individuals involved. She, like Dr. Rosenthal, felt that methadone patients received inadequate supportive services and testing. She said that she would not put anyone who was on methadone in a "public safety job" (Tr. Jan. 28, 1975, pp. 751, 753, 755-756, 769).

C

The court below in reaching its conclusions found what it called "impressive evidence" of successful employment of methadone maintained persons in various kinds of jobs such as sheet metal workers, truck drivers, teachers, electricians, cashiers, bank tellers, etc. (Opinion below, p. 49). The specifics, however, were sparse. The so-called "impressive" evidence nearly all came from persons either associated with or having an interest in the promotion of methadone maintenance or from employers who conducted special projects in collaboration with groups, including

methadone maintenance programs, which were sponsoring the employment of ex-drug users and abusers. None of the evidence was specific as to individual cases but consisted for the most part in broad sweeping assertions of successful employment of former addicts and methadone maintainees in all occupations and professions.

For instance, a witness, James E. Cooke, Director of Job Development for Addiction Research and Treatment Corporation (ARTC) located in Brooklyn, was testifying rather generally with respect to the successful employment of methadone patients treated at that center. Making reference to Px 56 (for identification) (Tr., Feb. 7, 1975, pp. 1175-1180), he offered evidence as to the number of ARTC patients employed and their various job classifications. When asked to identify the specific employers for verification purposes he objected on the ground of confidentiality which was sustained by the court. Consequently, the exhibit was stricken (pp. 1175-1197). This lack of particularization of the sweeping claims of employability of methadone patients and the court's acceptance of generalized testimony as probative constituted one of the gravest weaknesses underlying the court's findings. The deficiency pervaded the entire evidentiary presentation on the issue.

At one point the Court itself referred to such testimony, given by Paul Kolisch, Personnel Supervisor for Bernz-Omatic Corporation, an upstate manufacturer of propane torches, as "very superficial and general" telling the witness he should have "names, the dates, their histories, everything about them" and that "general information . . . is just worthless." Kolisch also said that none of the 9 individuals referred to his company by the Iroquois Rehabilitation Center were methadone patients and of that number all but one left the company after a few months. Their employment was temporary, he explained, until they went into "after care" (Px 42, Tr. Oct. 29, 1974, pp. 577-587).

Another witness for the plaintiffs, James Peterson, the Director of Employee Relations for the Utah Copper Division of Kennecott Copper, located near Salt Lake City, told about a counseling service he sponsored with his company for employees and their families. It was called "Insight" and reached out to "troubled people" in helping them with their problems whatever they might be. The program was run by a psychiatrist and was strictly confidential. Although drug addicts availed themselves of the service he could not tell if any of them were methadone patients, or what, if any, success was achieved with them. He had no specific information on any individual (Px 43, Tr. Oct. 29, 1974, pp. 594-607).

Another witness, Henry D. Biggart, Vice President for Community and Customer Services of the New York City Off-Track Betting Corporation (OTB), described how in 1971 OTB initiated a special program to hire former addicts "to involve some of these people in meaningful work experience." OTB sought out "persons who were least likely to be acceptable on the open job market . . . the people who had numerous arrests as a result of drug involvement." Most of those hired were not methadone patients. All these special experimental-type programs were promoted in cooperation with specialized agencies seeking job placement for former drug abusers. In this case it was the Vera Foundation which selected the candidates, monitored their program relationships and met frequently with OTB officials regarding progress being made. The witness said it started as an "experimental" program and generally proved successful. But again the entire subject was shrouded in generality with no specific case histories being given, only statistical information. This kind of proof is much less than "persuasive" and certainly insufficient to ground constitutional holdings (Px 44; Tr. Oct. 29, 1974, pp. 643-656).

Much the same kind of general testimony was given by Charles Ades, Vice President and Director of the Division

of Urban Affairs at Chemical Bank. His job was "to relate the Chemical Bank to the problems of primarily disadvantaged communities in New York City and the poverty communities throughout the City," including the hiring of ex-addicts, some of whom were on methadone but "most were not." That particular program was run in cooperation with Wildcat Service Corporation, which screened the applicants for the bank. The bank's experience was given in terms of statistical data with no hard information concerning individual cases beyond the general statement that "they are approximately the same as everybody else. Some are better, some are worse" (Tr. Oct. 24, 1974, pp. 338-341, 344-347).

Also, the experience of Con Edison with the employment of former drug users was related in much the same way. Its Assistant Vice President and Chief Medical Director, Dr. Thomas J. Doyle, described how as Chairman of the Drug Abuse Council of the New York State Society of Industrial Medicine he cooperated with Dr. Vincent Dole and with the Beth Israel Methadone Maintenance Treatment Program in hiring "a select group" of methadone patients in order to assess their stability and employability. Finding the experiment satisfactory, Con Edison expanded the program to include approximately 100 more. Dr. Doyle summed up the experience by saying that while his ability to generalize was limited both by the numbers and periods of time involved "we have not thus far encountered any major problems" (Px 39; Tr. Oct. 25, 1974, p. 572). All such unparticularized testimony is far too tenuous and tangential to the core issue here to sustain the constitutional claims made by the plaintiffs.

D

Looking at the TA's own experience, as reflected in the record here, with employees discovered to be maintained on methadone, such as the named plaintiffs, Carl Beazer,

Jose Reyes and class members Nathaniel Wright and Vannie Smith, the picture is not encouraging. Beazer, for instance, a towerman, was dismissed for using heroin and later methadone while participating in a methadone maintenance program. His dismissal was sustained below. His attendance record was extremely bad. He had exhausted all of his sick leave credits which in his 10 years of service could have accumulated to 144 days (Exhibits Dx K and Dx XXX). Likewise, Jose Reyes, employed as a ventilation and drainage maintainer and dismissed in 1972 for drug use and participation in a methadone maintenance treatment program, had a very poor attendance record for which he had been previously disciplined. For example, in 1970 he was absent for a total of 37 days which included 10 vacation days and in 1971 for 28 days also including 10 vacation days (Exhibits Dx L and Dx XXX). Class member Nathaniel Wright, employed as a car cleaner, was terminated in June 1976 for using methadone while in a maintenance program and for giving false information to the Authority respecting his use of drugs. His dismissal was also sustained by the District Court. During his 6 years of service he had built up a record of attendance which the hearing referee and the Authority's Executive Officer described as poor and which also had involved him in prior disciplinary charges for which he had been warned, cautioned or suspended (Exhibit Dx XXX). Another example is class member Vannie Smith who was employed as a conductor and dismissed in 1974 for his participation in a methadone maintenance program. His attendance was also very bad and at various times he too had been cautioned, warned or suspended and finally dismissed from employment in connection with a drug use charge (Dx M and Dx XXX).

E

In support of its conclusions the Court analogized the Authority's policy to employment policies having to do with mandatory maternity leaves, the hiring of non-citizens,

qualifications for admission to the bar, and cutoff scores on teachers' examinations that were found to be constitutionally deficient for failing to afford individual consideration to those adversely affected by such policies.

We do not need to quarrel with any of the holdings cited by the court in order to defend our position here, for the analogies limp quite badly. If there is one thing more than another that characterizes due process and equal protection anaylsis, it is the paramountcy of the particular facts and circumstances of the case under consideration. Argument by analogy may be helpful, but not if the analogies are applied doctrinaire-like to wholly unlike circumstances.

The Transit Authority is manifestly unique in the extent and magnitude of its operations, and the issue involved here is also unique as well as being very controversial. The blanket nature of its exclusionary policy regarding methadone patients must be judged therefore not just in terms of its effect on any given individual but with reference to the nature of the Authority's business, purposes and goals. Such was the focus of the court's attention in *Hodgson* v. *Greyhound Lines Inc.*, 499 F. 2d 859 (7th Cir. 1974), cert. denied 419 U.S. 1122, where it was held that Greyhound's refusal to consider applicants for intercity bus driver 35 years of age or over was not unlawful discrimination because of age. The Court said, "our concern goes beyond that of the welfare of the job applicant and must include consideration of the wellbeing and safety of bus drivers and other highway motorists." It pointed out that where the demands of the job are high and the risks involved are great, the employer has a lighter burden to show that his employment criteria are job related. It went on to say that it was not necessary for Greyhound to show "that all or substantially all bus driver applicants aver 40 could not perform safely," rather "to the extent that the elimination of Greyhound's hiring policy may impede the attempts of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations." Finding

Greyhound had made a "good faith judgment concerning the safety needs of its passengers and others," the charge of age discrimination was rejected. We deal here of course with a wider range of jobs in a somewhat different context, but the point is that the needs of the Authority and of the public which it serves must be given paramount consideration transcending in circumstances such as here claims of the methadone maintained individual. Neither due process nor equal protection require perfection and inequalities may exist without running afoul of the constitutional guaranties. Cf. *Weinberger* v. *Selfai,* 422 U.S. 749, 770-774 (1975); *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970); *Miller* v. *Wilson,* 236 U.S. 373, 382 (1915).

The Authority's policy does not presume anything with respect to the general employability or non-employability of persons maintained on methadone, rather it bans their employment in the Authority in order to serve a greater public interest. Cf. *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 377 (1973). When the Authority's judgment is exercised in the complex and controversial circumstances disclosed here as to the best means to effectuate its purposes, its judgment should not be disturbed.

F

This brings us to a discussion of the individual claims of Francisco Diaz and Malcolm Frasier which were sustained by the court to the extent of directing the Authority to appoint them to the positions earlier denied them or to equivalent positions, with back pay to January 1, 1973. The latter date was chosen by the court on the theory that by then the Authority knew or should have known that a substantial number of persons maintained on methadone were capable of successful employment (Op. p. 52). Of course, if that assumption be correct, the Authority would have been legally justified in rejecting Diaz for employment in 1970 when he first applied and that should be the end of the matter. However, at the court's direction the

Authority reconsidered him for reemployment in 1976 as a sheet metal maintainer's helper. In the Authority's judgment his interim record did not enhance his prospects. The Authority's report to the court (Exhibit Dx XXX), among other things, took note of Diaz's long 18 year history of heroin and other drug use, his conviction for possession of a hypodermic needle, his four unsuccessful attempts to break his habit, his spotty program record, and his checkered employment record of late. The court, nonetheless, and accusing the Authority of not acting in "good faith" (Tr. Jan. 13, 1977, p. 169) substituted its judgment and directed Diaz's appointment, with back pay as indicated.

Likewise, the Authority's reevaluation of the employment of the plaintiff Frasier as a car cleaner was rejected by the court (Dx XXX). The Authority pointed out that prior to Frasier's application to be appointed as a bus driver in 1973 he had earlier sought employment as a bus driver in 1971, but was rejected for reasons unrelated to his history of heroin addiction which existed but was not made known to the Authority at that time. In February, 1973 he again applied for appointment as a bus driver having entered a methadone program in October, 1972. In the interim he had also been convicted of the possession of heroin. He was not appointed. Within weeks thereafter his application came before the Authority for appointment as a bus cleaner at which time he claimed he had been successfully detoxified. Even by the court's standards six months in a program, no matter how good that program might be, is less than acceptable evidence of satisfactory rehabilitation. In this case the program involved, sponsored by the Mary Scranton Foundation, later went out of business.

In relation to Diaz and Frasier, the Court's amended judgment enjoins the Authority from using the provisions of New York Civil Service Law, § 61 (the "one-out-of-three rule") to deny them employment. While it is somewhat

inappropriate to talk about the "one-out-of-three" rule in the context of a lone candidate for appointment, it does legitimately play a part in the appointment process of individuals who are certified to the Authority by the examining City agency as eligible for appointment to Authority positions, including operating as well as non-operating or clerical-type positions. The constitutionality of the rule was challenged on due process grounds in *Koscherak* v. *Schmeller*, 363 F. Supp. 932 (Three Judge Court, S.D.N.Y. 1973), affirmed 415 U.S. 943 (1974), and upheld as a valid legislative enactment even though no reason was given to the applicant for denying employment. Underlying the rule of course is the legislative judgment that a public employer should have some choice, albeit a limited one, in making selections among eligibles. It is a question of selecting the best, not rejecting the worst, and in that context is a permissible exercise of discretion by the appointing agency, whether applied to operating or clerical positions in the Authority. See *City of Schenectady* v. *State Division of Human Rights*, 37 NY 2d 421 (1975).

Mention may be made here of the fact that the policy of the City of New York (adopted in 1972 and referred to by the court in its opinion and also in connection with fixing a date for the commencement of back pay) regarding the employment of persons with drug histories differentiated between "sedentary" positions and positions in the uniformed forces such as police, fire and sanitation. While in the latter case a history of prior drug use could be a basis for rejection, in the sedentary class of cases such a history could be a cause for rejection "unless the eligible is successfully participating in a recognized chemotherapeutic program or has satisfactorily completed any other acceptable program and is drug free" (Px 7 and Px 10).

POINT II

The Authority's policy respecting the employment of methadone patients does not violate Title VII of the Civil Rights Act of 1964, as amended, and the plaintiffs are not entitled to relief thereunder.

G

After finding it unnecessary at first to reach the plaintiffs' Title VII claims of racial discrimination, the Court reconsidered the issue on plaintiffs' application for Title VII relief, admittedly made for the sole purpose of establishing a basis for claiming attorneys' fees. The Court then found that the plaintiffs had a valid Title VII cause of action and were entitled to an award of attorneys' fees, later fixed at $[illegible],000, including disbursements of $14,290. The Court based its holding on a finding that the disputed Authority policy had a greater impact on minority groups than on whites and not being justified by any business necessity violated Title VII. We argued then and we argue here that the facts do not present a proper case for Title VII relief.

There are compelling reasons for denying such relief. In the first place we believe that the Authority has demonstrated a sufficient business reason to overcome any claim of racial discrimination in the hiring of methadone patients. Moreover, not every employment criterion having some racial impact necessarily falls within the purview of Title VII. This Court has said that the impact must be "significant and substantial," or "harsh." *Chance* v. *Board of Examiners,* 458 F. 2d 1167, 1175-1176. These norms were echoed in *Bridgeport Guardians Inc.* v. *Members of Bridgeport C.S. Com'n.,* 354 F. Supp. 778, 787, aff'd and rev. in part, 482 F. 2d 1333 (1973) and in *Vulcan Society of N.Y. City Fire Dept. Inc.* v. *The Civil Service Commission,* 360 F. Supp. 1265, 1268, aff'd in part, 490 F. 2d 387 (1973).

In this case the showing of impact is neither significant, substantial nor harsh. Indeed, it is *de minimis*. Census data (1970 Census of Population, Vol. 1, Characteristics of Population, Part 34, NYNENJ-SCA) indicates a total population of about 16,000,000 in the New York Metropolitan area, which would be the Authority's relevant labor market, of which the minority component is about 3,000,000 or 20 per cent. Given a methadone maintained population of about 40,000 in the area, of which about 61 per cent are Black and Hispanic, that means that approximately 24,000 of the 3,000,000 minority class, or 0.8 per cent would belong to the plaintiffs' class. That certainly is not a figure that could be characterized as significant or substantial in terms of racial discrimination within the intendment of Title VII (Tr. Jan. 7, 1975, p. 114; Px 21).

Moreover, there is no evidence whatever of any discriminatory racial purpose in the Authority's questioned policy. Indeed, its policy is quite the opposite. The statistics of record show that the Authority has an enviable record in the hiring and promotion of Blacks and other minority groups. About 40 per cent of the Authority's work force is Black and 6 per cent is Hispanic which represents a much higher proportion of these groups than in the Authority's relevant labor market (Dx P, EEO-4 Reports). If discrimination could be said to exist at all it was not motivated by any racial considerations but was rooted in the Authority's desire to maintain the integrity and reliability of its work forces by not introducing into its employment persons using narcotic and other drugs, including methadone. The Authority's excellent record in promoting Black and minority employment in New York City surely cannot be considered inconsequential in a Title VII action, such as here, where the disparate impact complained of is, as we have said, *de minimis*.

Neither of the two cases cited by the District Court support its holding that the Authority's liberal policies

in this area were not a defense with respect to the exclusionary policy at issue. Indeed, the first case cited by the court, *Davis* v. *Washington,* 512 F. 2d 956 (D.C. Cir. 1975), has been reversed, 426 U.S. 229 (1976). In *Davis* two Black police officers of the District of Columbia claimed that the District's promotion policies were discriminatory and violated the due process clause of the 5th Amendment. The circuit court applied Title VII standards regarding disparate impact as enunciated in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The Supreme Court, however, said a showing of discriminatory intent or purpose was necessary when a challenge was made under the due process clause and that the affirmative efforts of the District's police department to recruit Black officers negatived any inference of racial discrimination. Furtherfore in *Davis* the Supreme Court noted its disagreement with a number of decisions involving employment discrimination, including decisions of this Court (*Chance* v. *Board of Examiners, supra,* and *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission, supra*), "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation."

Davis was soon followed by *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* —— U.S. ——, (1977), 45 LW 4073, wherein it was claimed that the refusal of the Village of Arlington Heights to rezone to allow the building of racially integrated low and moderate income housing discriminated against racial minorities in violation of the 14th Amendment's Equal Protection Clause. Reversing the Circuit Court, which had found a constitutional violation because of the disproportionate racial impact of the village's policy, the Supreme Court said that *Washington* v. *Davis* had "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." To the same effect see *Stone* v. *F.C.C.,* 466 F. 2d 316 at 329-330

(D.C. Cir. 1972) and *Swain* v. *Alabama,* 380 U.S. 202, 208-209 (1965).

The cited cases of course deal with racial discrimination in a constitutional or statutory context and not with Title VII, but the Supreme Court at its current Term has accepted for review a case presenting the issue whether Congress had authority under Section 5 of the 14th Amendment to prohibit by Title VII of the Civil Rights Act of 1964, as amended, employment practices of an agency of State government in the absence of proof that the agency purposefully discriminated against applicants for employment on the basis of race. *Hazelwood School District* v. *U.S.,* 534 F. 2d 805 (8th Cir., 1976), cert. granted, 45 LW 3454, January 11, 1977.

The judicial winds appear to be shifting, but shifting or not we find it difficult to place the facts of this case in a Title VII setting, a statute primarily concerned with racial and other forms of historical discrimination. The racial disabilities which Title VII sought to remove were disabilities cutting across entire minority classes, while the disability involved here, relates only to a minute portion of that class. As the authors of a "Note" in the April, 1974 issue of the New York University Law Review (49 N.Y.U.L. Rev. 67, pp. 77-78) stated, in discussing employment discrimination against rehabilitated drug addicts, "the reach of Title VII is not infinite." They were talking about the employment of ex-addicts (not, as here, methadone patients, who, whether referred to as ex-addicts or not, are still addicted persons) and wrote that Title VII must be stretched "to reach the apparently neutral policy of barring ex-addicts from jobs on the ground that such a policy constitutes defacto discrimination." The link between ex-addicts and racial discrimination became further attenuated, they observed, when the normally found criminal background of such persons is taken into account. Drug addiction, it was said, "would not be deemed by most

observers to be a [similarly] non-volitional condition and criminality is certainly not so." Summing up, the authors concluded, "[t]here are substantial obstacles to the use of Title VII as a means of eradicating this unequal treatment and these obstacles can be overcome only through the application of circuitous legal reasoning."

H

If the plaintiffs have no Title VII cause of action they are of course not entitled to attorneys' fees because that is the statute upon which the award of attorneys' fees was based. True, plaintiffs subsequently made a motion for a declaration of the Authority's liability for attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, suggesting to the Court at the same time that such a finding would "simplify[ing] the appeal in this case by obviating the need for a review of the Court's decision of May 5, 1976 concerning Title VII liability." It is small wonder that the plaintiffs sought to avoid tying themselves to Title VII since, as we have shown, the tie is most tenuous if existent at all. As indicated, the Court did not act on the plaintiffs' motion, so that failing a valid Title VII claim, plaintiffs are not entitled to attorneys' fees at all. In any case, the amount of the award, incorporating a flat bonus fee of $60,000 in addition to an award of $300,000 based upon attorneys' worktime appears grossly excessive in the circumstances. As the record here shows, *seriatim*, the plaintiffs were represented by three attorneys at almost every pretrial activity, such as the taking of depositions, etc., and on days of trial by three or more. The necessity for such extensive legal representation is certainly not apparent. Also, while a necessary amount of paperwork is of course incident to all litigation, plaintiffs' attorneys simply deluged the Court and their opponents with a prolific outpouring of documents and exhaustive memoranda far beyond the needs of the occasion. Motions were brought on repeatedly in disregard of the Court's published

instructions that a conference be sought before making a motion. Had such conferences been sought, much of the paperwork could have beeen dispensed with. The sheaves of papers, for instance, filed and served in support of the plaintiffs' motion to modify the Court's judgment, made prior to consultation with the Court, so overburdened the Court that, as the Court itself indicated, it did not have time to read them before meeting the parties in conference. When a conference was held the parties' difficulties were resolved quickly without assistance from such voluminous paperwork. The superfluous hours spent on the preparation of all such documents as well as the extradimensional legal representation should not be charged against the Authority. Appropriate is the Court's observation in *Blank* v. *Talley Industries, Inc.,* 390 F. Supp. 1 (S.D.N.Y. 1975) involving atttorneys' fees in a securities fraud class action:

> "While time is a factor, it should be stressed that it is only of relative importance. To give it prime importance may at times result in rewarding inefficiency or the luxurious practice of law and penalizing those who are efficient and expeditious in performing their legal tasks."

Plaintiffs' attorneys are not engaged in commercial litigation nor, as far as we know, do they practice law for economic gain, which might give a different complexion to their claims. They pursue public interest litigation that admittedly is "funded by a number of private foundations including the Ford Foundation and by a governmental agency" (Px 1007, Affidavit, Mark C. Morril, p. 3). Considerations such as these have persuaded courts in civil rights actions to determine fees at substantially lower levels than might be allowed in non-civil rights cases. See *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 66 F.R.D. 483 (W.D.N.C. 1975); *Barth* v. *Bayou Candy Co.,* 379 F. Supp. 1201 (E.D. La. 1974); and *Rios* v. *Enterprise Ass'n Steam. Loc. 638 of U.A.,* 400 F. Supp. 993, 996 (S.D.N.Y. 1975).

In each of these cases, fees were fixed at a much lower figure than the going rate and without any overloading.

The fees sought by plaintiffs must be assessed against a public benefit corporation performing an indispensable public service, which the Court may judicially note is in a precarious financial condition, with looming budget deficits and no expectation of meeting such deficits without outside governmental subsidies. It has no taxing powers of its own, and short of getting such outside help would have to resort to a fare increase or take other drastic measures additionally burdening the subway and bus rider. A rider might legitimately ask why he should be expected to subsidize litigation brought on behalf of methadone patients by a public interest law group supported in large part by private and public funds. Even nominal fees appear questionable in these circumstances.

Here, as in civil rights cases generally the award of fees must ultimately rest where the statute places it, in the sound discretion of the Court, with due regard to all the relevant circumstances. In *Rios,* for example, cited above, the Court (Bonsal, J.) reduced the attorneys' fees sought by a public interest law group from approximately $128,000 to $50,000, payable in installments, in order not to unduly burden the defendant union. The union, the Court said, was a non-profit organization unable to pass the expenses of attorneys' fees on to its customers. This and other compelling circumstances speak against any award at all.

CONCLUSION

Plaintiffs have failed to prove a cause of action under the 14th Amendment for a violation of due process or equal protection or under Title VII of the Civil Rights Act of 1964 and their complaint should be dismissed with costs and disbursements.

Dated, February 28, 1977

Respectfully submitted,

ALPHONSE E. D'AMBROSE
Attorney for New York City Transit Authority and related transit defendants

E. W. SUMMERS
G. T. DUNN
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- x

CARL A. BEAZER, et al.,

Plaintiffs-Appellees-
Cross-Appellants,

- against -

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants-Appellants-
Cross-Appellees.

- x

Docket No. 76-7295

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

STEPHEN A. WALKER, JR., being duly sworn, deposes and says that he is employed by the attorney for the defendant-appellant, New York City Transit Authority and is over 18 years of age. That on February 28, 1977 he served two copies of the BRIEF FOR NEW YORK CITY TRANSIT AUTHORITY, et al., DEFENDANTS-APPELLANTS on Elizabeth B. DuBois, Esq., attorney for plaintiffs-appellees, by leaving said copies at her office, 271 Madison Avenue, New York, N. Y. with a person in charge of that office.

Stephen A. Walker Jr.
STEPHEN A. WALKER, JR.

Sworn to before me this 1st
day of March, 1977

Linda Kay Nealon
LINDA KAY NEALON
Notary Public, State of New York
No. 03-4631335
Qualified in Bronx County
Commission Expires March 30, 1978